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**In the Supreme Court**  
**OF THE**  
**UNITED STATES**

—  
**OCTOBER TERM, 1923**  
—

**THE WESTERN UNION TELEGRAPH COMPANY,**  
a Corporation,

**Petitioner,**

**vs.**

**J. A. CZIZEK,**

**Respondent.**

—  
**BRIEF ON BEHALF OF WESTERN UNION**  
**TELEGRAPH COMPANY,**  
**PETITIONER.**  
—

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THE WESTERN UNION TELE-	}	No. 300
GRAPH COMPANY, a Corpora-		
tion,		
		<i>Petitioner,</i>
	vs.	
J. A. CZIZEK,		
		<i>Respondent.</i>

---

## BRIEF ON BEHALF OF WESTERN UNION TELEGRAPH COMPANY, PETITIONER.

---

The cause comes to this court on certiorari to the Circuit Court of Appeals for the Ninth Circuit. The case was twice tried in the District Court and was twice before the Circuit Court of Appeals.

The action was brought by respondent, Czizek, against the telegraph company for damages for failure

to transmit and deliver to respondent an interstate telegram filed by his agent at Boise, Idaho, relating to the sale of certain shares of stock in the Idaho National Bank. The suit was begun in the State court in Idaho and removed to the Federal court, on the ground of diversity of citizenship. It was first tried in the District Court (without a jury), and judgment rendered for defendant. As the message was interstate, the court held that the provisions on the message blank relating to unrepeatd messages and messages valued at \$50, which regulations had been filed with and approved by the Interstate Commerce Commission, were applicable to and constituted a defense to the action, and gave judgment for the defendant. (See opinion of Judge Dietrich, Tr., p. 152.) On writ of error to the Circuit Court of Appeals this judgment was reversed, the latter court holding that the Act of Congress regulating the field of interstate telegraphy and the rules and regulations fixing liability as to the different classes of messages were not applicable where the telegram failed of transmission and delivery through the negligence of the company's employe at the originating office of the company *after* it had been filed, classified in accordance with the regulations, and accepted for transmission; and further held that if such regulations which had been approved by the Interstate Commerce Commission were applicable, they would be void in such case as against public policy. (Opinion of Circuit

Court of Appeals, Tr., p. 161, and also 272 Fed. 223.) On retrial of the case the District Court, in deference, as was stated, to the views of the Circuit Court of Appeals, gave judgment for plaintiff, which, on second writ of error, was affirmed. (Tr., p. 143, and also 286 Fed. 478.)

Meanwhile the Supreme Court of the United States decided the case of *Western Union Tel. Co. vs. Esteve Bros.*, 256 U. S. 566, holding that the sender of an unrepeatd message at the *lower rate cannot escape the attendant limitation of liability fixed by the regulations adopted pursuant to the Act of Congress*. It was held, however, by the Circuit Court of Appeals in its last opinion that its decision on the former appeal (272 Fed. 223) had become the *law of the case*. A petition was then filed by the telegraph company for certiorari to review this decision and the decision of the same court on the former appeal. The writ of certiorari was granted by this court, and the entire record has been filed herein.

### QUESTIONS INVOLVED

The message in suit was an interstate message filed at the office of the telegraph company at Boise, Idaho, to be transmitted and delivered to respondent at Oakland, California.

The cause, therefore, involves the validity, as well as the application to the facts of the case, of the rules and regulations of the telegraph company for classi-

fication of messages, and prescribing the *rates of toll and the corresponding measure* of liability for each of such classes, pursuant to the Act of Congress. These regulations filed with the Commission relate:

First. To the measure of liability assumed by the company in respect to an *unrepeated message*.

Second. To the measure of liability in the case of a message *valued by the sender for rate-making purposes at a sum not to exceed \$50*.

Third. To the time within which claims for damages must be presented.

These rules and regulations are the same as those which have been before this court in a number of recent cases, which will be cited in proper order.

The cause also involves the question whether there was any competent evidence in the case to show that the respondent suffered any loss.

### STATEMENT OF THE CASE

The facts as shown by the special findings and by the evidence are, briefly, as follows:

On November 30, 1917, defendant in error, who was plaintiff in the court below, was the owner of fifty shares of stock in the Idaho National Bank having a par value of \$100 per share, which at that time was held by the Security Bank of Oakland, Calif., as security for a loan. On that date one T. J. Jones of Boise delivered to the Western Union Telegraph Company at its office in Boise, Idaho, a telegram writ-

ten on one of the company's blanks, addressed to J. A. Czizek, 5767 Shafter avenue, Oakland, Calif., reading as follows:

"Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Nov. 30, 1917.

J. A. Czizek,  
5767 Shafter Avenue,  
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow. **Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer.**

T. J. JONES,

(454 Yates B)

(.65c) (408-W)"

The message blank on which said telegram was written contained among other things the following conditions, rules and regulations, subject to which said message was accepted for transmission. (See Tr., pp. 43-46.)

*"All telegrams taken by this company are subject to the following terms:*

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeatd

telegram rate is charged in addition. Unless otherwise indicated on its face, **THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH**, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any **UNREPEATED** telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any **REPEATED** telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams*.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of **FIFTY DOLLARS**, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

• • • • •

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

\* \* \* \* \*

"8. No employe of the Company is authorized to vary the foregoing."

The telegram in question was an *unrepeated message* of the class known as a night letter, and was *valued at a sum not to exceed \$50*. The rate paid was that required for messages of that class, that is, the *rate prescribed for the transmission of an unrepeated message valued at \$50*. The message was delivered to and accepted by the telegraph company for transmission and delivery, *subject to the above rules and regulations*. (See Findings VI and VII, Tr. p. 47.)

Prior to the time said telegram was received at Boise and accepted for transmission, the above rules, rates, charges and classifications of messages, established pursuant to the Act of Congress, and the form of telegraph blank upon which the same were printed, had been filed with the Interstate Commerce Commission, and "the said Commission had acquiesced in and *approved the provisions therein contained* and the rates, charges and classifications thereby established prior to the filing of said telegram with defendant, thus recognizing the right of the defendant to charge

a higher rate for a greater liability and a *lower rate for a lesser liability*" (Finding IX, Tr. p. 47).

Through the negligence, or, as the court found, through the *inadvertence* of Margaret Brown, "a capable and efficient employe," the message, after it had been received and accepted for transmisson, was placed in the wrong file of messages, which resulted in its non-transmission and non-delivery; "and the non-transmission of the telegram was due to her inadvertence and was not due to any wilful, malicious or wanton act on her part." (Findings XII and XIII, Tr., p. 49.) Before respondent, Czizek, learned that such message had been sent to him, the Idaho National Bank went into liquidation.

The District Court, after making the Special Findings of Fact set out in the Transcript, pages 41-51, filed this conclusion of law:

"It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not transmitted at all, it is accordingly held that plaintiff is entitled to judgment." (Tr., p. 51.)

### *SPECIFICATIONS OF ERROR*

The errors assigned by petitioner on this writ are set forth in detail in the record at pages 126-129, inclusive, which are here referred to, but stated generally, they are:

1. The special findings of fact are insufficient to support the judgment.
2. The court erred in holding that the defensive provisions on the telegraph blank were inapplicable where the telegram was never transmitted, and that while such provisions relieved the company from liability for negligence occurring in the course of transmission or at the terminal office of said company, they did not relieve the company from liability for negligence occurring at the sending office before the telegram was actually started over the wires.
3. The court erred in holding and deciding that the *valuation placed on the message for rate-making purposes*, as authorized by the amendment to the Interstate Commerce Act of June 18, 1910, and approved by the Interstate Commerce Commission, was not binding in case of failure to transmit and deliver, and that the binding effect of such *valuation* is dependent or conditioned upon transmission or partial transmission of the telegram.
4. The court erred in holding and deciding that the following provisions of the regulations upon which

the rates charged for the telegram were based, to-wit: (a) the unrepeatd message clause; (b) the valuation clause, and also (c) the clause requiring written claim for damage within sixty days, were inapplicable for any reason.

5. The court erred on the second trial herein in overruling defendant's objection to the testimony of plaintiff that if he had received the telegram in question he would have wired an answer and sold his bank stock.

6. There is no competent evidence sufficient to support the finding that if defendant in error had received the telegram promptly, he would have accepted the offer for his bank stock and could have delivered such stock in time to avail himself of said offer.

7. The evidence is insufficient to sustain the finding that on November 30, 1917, and until December 5, 1917, David Miller was ready, able and willing to buy plaintiff's stock in the Idaho National Bank.

8. The evidence is insufficient to justify the finding that the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted.

## BRIEF OF THE ARGUMENT

The legal duty of a telegraph company and the measure of its liability in relation to interstate messages is determined by the Interstate Commerce Act and the rules and regulations of the company, on file with the Interstate Commerce Commission and approved by it.

*Act of June 18, 1910, 36 Stat. L. 539-544, 4*

*F. S. A. (2d Ed.,) p. 337;*

*Postal Telegraph Cable Co. vs. Warren Godwin Lbr. Co., 251 U. S. 27, 64 L. Ed. 118;*

*Western Union Tel. Co. vs. Esteve Bros., 256 U. S. 566, 65 L. Ed. 1094.*

The classification of interstate telegraph messages into *specially valued*, repeated and unrepeatd messages, with a different rate and a different measure of liability for each classification, having been made under the authority of the Interstate Commerce Act, and having been approved by the Interstate Commerce Commission, the requirement of uniformity and equality of rates and liability imposed by that Act prevents any deviation from the established rates and measure of liability either by contract or by a judicial award of damages.

*Western Union Tel. Co. vs. Esteve Bros., 256*

*U. S. 566, 65 L. Ed. 1094;*

*Western Union Tel. Co. vs. Boegli*, 251 U. S.  
315, 64 L. Ed. 281;

*Postal Tel. Co. vs. Warren Godwin Lbr. Co.*,  
251 U. S. 27, 64 L. Ed. 118.

The message being in interstate commerce, the un-repeated message clause on which the toll was based limited the liability of the company in case of non-transmission or *non-delivery* to the amount of such toll, whether the message failed at the initial point or elsewhere on the company's line.

*Western Union Tel. Co. vs. Esteve Bros.*,  
*supra*;

*Western Union Tel. Co. vs. Boegli*, *supra*;

*Postal Tel. Co. vs. Warren Godwin Lbr. Co.*,  
*supra*;

*Dickerson vs. Western Union Tel. Co.*, 114  
Miss. 115;

*Norris vs. Western Union Tel. Co.*, 174 N. C.  
92;

*Western Union Tel. Co. vs. Orr*, 60 Okla. 39,  
158 Pac. 1139;

*Hartness vs. Western Union Tel. Co.*, 112 S. C.  
11, 99 S. E. 759;

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210,  
192 S. W. 70;

*Western Union Tel. Co. vs. Hawkins*, 198 Ala.  
682, 73 So. 973.

The measure of the telegraph company's liability under the *valuation clause* of the regulation, based upon the rate paid, became fixed when the message was *deposited in the sending office* and accepted for transmission, and it could not thereafter be varied by showing that the negligence complained of was gross negligence or that it occurred at the initial point.

*Cultra vs. Western Union Tel. Co.*, 44 I. C. C. Rep. 670;

*Bailey vs. Western Union Tel. Co.*, 97 Kans. 619, 156 Pac. 716;

*Western Union Tel. Co. vs. Schade*, 137 Tenn. 214, 192 S. W. 924;

*Postal Tel. & Cable Co. vs. Warren Godwin Lbr. Co.*, 251 U. S. 27, 64 L. Ed. 118;

*Frederick vs. Western Union Tel. Co.*, 189 Iowa 1138, 179 N. W. 934;

*Klotz vs. Western Union Tel. Co.*, 187 Iowa 1355, 175 N. W. 825.

The rule in the railroad and express cases in relation to similar *valuation clauses* relieves the company from liability beyond the value agreed upon as the basis of the rate, regardless of the degree of negligence; and the principle thus established necessarily requires the observance of the same rule in regard to telegraph companies engaged in interstate commerce.

*Adams Express Co. vs. Croninger*, 226 U. S. 491, 57 L. Ed. 314;

*Kansas City Co. vs. Carl*, 227 U. S. 639, 57 L. Ed. 683;

*Missouri Railway Co. vs. Harriman*, 227 U. S. 657, 27 L. Ed. 690;

*Wells Fargo Co. vs. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600;

*Donton Bros. vs. Southern Pacific Co.*, 151 Cal. 763.

The *sixty-day clause* in the regulations relieved the company from all liability, as no claim in writing was presented within sixty days after filing the message, or *within sixty days after discovering that the message failed in transmission and delivery*.

*Gardner vs. Western Union Tel. Co.*, 145 C. C. A. 399, 231 Fed. 405;

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210, 192 S. W. 70;

*Postal Tel. Co. vs. Nichols*, 159 Fed. 43.

Cases cited *supra* in regard to valuation and unrepeat message clauses.

Plaintiff's testimony as to what he would have done if the telegram had been received was inadmissible, and the evidence was insufficient to sustain the finding that he would have accepted the offer and could have delivered his stock in Boise and received the sum of \$4500 in cash in payment therefor.

*Richmond Mills vs. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290;

- Western Union Tel. Co. vs. Watson*, 94 Ga. 202, 21 S. E. 457;  
*Beatty Lbr. Co. vs. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309;  
*Kiley vs. Western Union Tel. Co.*, 39 Hun 158, affirmed 109 N. Y. 231;  
*Western Union Tel. Co. vs. Ferguson*, 157 Ind. 64, 213, 54 L. R. A. 846;  
*Hall vs. Western Union Tel. Co.*, 59 Fla. 275, 51 So. 819, 27 L. R. A. (N. S.) 639;  
*Smith vs. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126;  
*Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371.

## ARGUMENT

The regulations governing the classification of interstate messages in respect to rates and liability established in accordance with the Act of 1910 include the following:

First. That as to unrepeatd messages the company shall not be liable beyond the amount of toll received in cases of (1) mistakes, (2) delays, or (3) *non-delivery*.

Second. That *in any event* the company shall not be liable for mistakes or delays or *non-delivery* beyond the value placed upon the message by the sender as a basis of the rate to be paid which, in this case, was \$50.

Sixth. That the company will not be liable *in any case* unless claim in writing be presented within sixty days from the time the message was filed.

These regulations, adopted under the express authority of the Act of Congress and approved by the Interstate Commerce Commission, have now been held by the Supreme Court in cases hereinafter referred to to be valid. It is held in *Gardner vs. Western Union Tel. Co.*, 231 Fed. 401, approved by this Court, that these regulations are binding alike upon the sender and the *receiver* of an interstate message.

The cases recently before this Court, where the

Act was construed and the above regulations held to be valid, are:

*Western Union Tel. Co. vs. Esteve Bros. Co.*,  
256 U. S. 566;

*Postal Tel. Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27;

*Postal Tel. Co. vs. Dickerson* (mem.), 254 U. S. 609;

*W. U. Tel. Co. vs. Boegli*, 251 U. S. 315.

The court also, in the *Warren Godwin* case, approved the opinion of the Interstate Commerce Commission in

*Cultra vs. Western Union*, 44 I. C. C. 670.

#### LIABILITY OF THE TELEGRAPH COMPANY IN THE CASE OF UNREPEATED MESSAGES

Before the Act of Congress, the telegraph company was subject to a *common-law liability*, which could be modified or not by contract, according to the views of public policy prevailing in the different jurisdictions, among which there was on many questions sharp conflict of authority. The extent of liability depended therefore, in some degree, upon the accident of jurisdiction in each particular case. But by the Act of Congress the rule was made uniform, which this court has said was the dominant purpose, and the liability of the company in respect to different classes of mes-

sages became thus fixed *by law and cannot be modified by agreement of the parties.*

It is said in *Western Union Tel. Co. vs. Esteve Bros.*, 256 U. S. 566, decided after the first decision of the Circuit Court of Appeals in the instant case, that the question there presented for decision was, whether *since* the amendment of June 18, 1910, the sender of a telegraph message is bound as a matter of law by the provision limiting liability *because it is a part of the lawful established rate.*

Answering this question affirmatively, the court said (*italics ours*):

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act, the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several States. *Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates.* Uniformity demanded that the rate represent the whole duty and *the whole liability of the company.* **It could not be varied by agreement; still less could it be varied by lack of agreement.** The rate became, not, as before, a matter of contract, by which a legal liability could be modified, but a matter of law, by which a uniform liability was imposed. Assent to the terms

of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

The regulation, first above quoted, provides among other things that the company will not be liable in case of *non-delivery* of an unrepeatd message beyond the amount received for sending the same. The message in suit was an unrepeatd message and it was *not delivered*. It follows, therefore, that the case comes within the express terms of the regulation fixing the extent of the company's liability in respect to such class of message which is not delivered.

The liability of the company attaches and becomes fixed under the rule when the message is placed in interstate commerce, that is, when it is received by the company, classified by the sender in respect to rate of toll to be paid and the corresponding liability to be assumed, and is thus accepted for transmission and delivery in accordance with such classification. The measure of liability for either mistake, delay or *non-delivery* caused by the negligence of *any* employe is thus fixed by law in accordance with this uniform national rule. As said in the *Estere Bros.* case, the rate became a "matter of law by which *uniform liability* was imposed," and represents "the whole duty and the *whole liability*."

## PURPOSE OF ACT OF CONGRESS

The dominant purpose of the Act of Congress, as held in the above cases, was to take over and subject to a uniform national rule under the administrative control of the Interstate Commerce Commission, the *entire field of interstate telegraphy*. It was intended by the Act, as construed by this court, to secure entire equality and uniformity, not only as to rates, but as to *liability* in respect to all messages sent in interstate commerce.

It was held, however, by the Circuit Court of Appeals in its first opinion, which it later decided had become the "law of the case," that while the rules and regulations referred to, filed with and approved by the Interstate Commerce Commission, are valid and binding on the users of the telegraph in cases of mistakes or delays of messages, they have no application to a case where the message, although received and accepted for transmission under the classifications above made, thereafter fails through the fault of the company's employes at the originating office, and is not transmitted *nor delivered*. Petitioner, on the contrary, contends that its liability in respect to said message became fixed and determined when it was filed and accepted for transmission and classified by sender for rate-making purposes under the provision of the Act of Congress, and the regulations of the Interstate Commission.

There can be no dispute that a message, when filed

and accepted for transmission and classified as to rate and value, is in interstate commerce. The decision of the Circuit Court of Appeals, however, excludes from the operation of the rule of equality and uniformity all those messages which fail of transmission and delivery through negligence of the employes at the office where such messages are filed, and restricts the operation of the Act of Congress under said rules and regulations to but a *portion* only of interstate messages.

The decision of the Circuit Court of Appeals is based on the theory that a *contract* was made between the company and the sender of the message, and that, as there was an entire failure of performance on the part of the company by its neglect to put the message in course of transmission, it cannot enforce the contract. Yet this court has said in the *Esteve* case that the Act of Congress introduced a new principle into the legal relations of the telegraph companies with their patrons, and that the liability in *all* cases is fixed, *not by contract*, but as a matter of *law*, which cannot be varied by the parties.

The case is not taken out of this uniform rule because the negligence resulting in the *non-delivery* of the message was committed by an employe at the sending office. It matters not which employe of the company was at fault. They are all engaged in interstate commerce. Those at the sending office handling such a message are as much engaged in interstate commerce and have as full responsibility for the transmission and

delivery of the message as those at the terminal office of the company. If the message when filed and classified and accepted for transmission is in interstate commerce and yet is still subject to the rule of the common law instead of the Act of Congress, then the Act did not take over the regulation of the entire field of interstate telegraphy as held in the above decisions. Neither the Act itself nor any of the regulations adopted by its authority contain any such restrictive provision or exception to the scope of its application in respect to interstate messages.

Before the Act of Congress, and while the matter of liability of the telegraph company was subject to modification by contract according to the divergent views of public policy in the different jurisdictions, many States held that the above clause of the contract respecting non-delivery had no application and was void as against public policy in case the message, after being transmitted, failed of delivery, through negligence at the *terminal* office. All those cases have been overruled by this court. The lower court in the instant case has held that the provisions have no application where the message failed of transmission and delivery by reason of the negligence of an employe at the office where the message was *filed*. The court cited, in support of its opinion, four Federal cases, viz.:

*Western Union vs. Gask* (1894), 61 Fed. 624;

*Postal Tel. Co. vs. Fleischner* (1895), 66 Fed. 899;

*Swan vs. Western Union* (1904), 129 Fed. 318;

*Postal Tel. Co. vs. Nichols* (1908), 159 Fed. 643.

The above cases, however, were decided before "the Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons, which dominated and modified the principles previously governing them," and subjected interstate commerce by telegraph to a uniform national rule.

We respectfully contend that the distinction drawn by the Circuit Court of Appeals excepting this class of interstate messages from the operation of the Act cannot be maintained. It is based upon the theory that the rights of the parties were defined by contract and that the defensive provisions had no application where there was a total failure of transmission. But the message was in interstate commerce from the time it was filed, and, as said by this Court in the *Estere Bros.* case, the rate became not, as before, a matter of contract, but a matter of law, and represented not only the whole duty, but the *whole liability*.

THE DECISION OF THE COURT OF APPEALS CONFLICTS  
DIRECTLY WITH THE CASE OF POSTAL TEL. CO. VS.  
DICKERSON, 254 U. S. 609.

The Court of Appeals in its first opinion (see 272 Fed., bottom, p. 228) refers to "the absence of a controlling decision." We respectfully urge that all of the decisions of the Supreme Court cited above are controlling decisions inasmuch as they interpret the purpose of the Act of Congress to have been to subject the whole field of interstate telegraphy to one uniform national rule, and to the administrative control of the Interstate Commerce Commission. But the Court of Appeals, in referring to the absence of a controlling decision, undoubtedly meant a case in which there was a total failure of transmission. Such a case is found, however, in

*Postal Tel. Co. vs. Dickerson*, 254 U. S. 609.

The opinion in that case is a memorandum opinion, but the facts are stated in the decision of the State court in the same case reported 114 Miss. 115, which shows, page 117, that the message was filed with the Postal Telegraph Co. which *failed to transmit it*. The facts of this case are also reviewed in *Warren Godwin* case, 116 Miss. 660.

Dickerson sued both the Postal Telegraph and the Western Union Telegraph Company for damages for the *failure to transmit* and make prompt delivery of an interstate telegram from Tupelo, Miss., to Guin,

Ala., announcing the death and burial of a relative, and charging gross negligence. The message was filed with the *Postal Telegraph Company*, but that company, although it had an office at both points above named, did not transmit or make any effort to transmit the message, but merely delivered it to the Western Union. The trial court, following the *Showers* case, referred to by Chief Justice White in the *Warren Godwin Lumber Co.* case, 251 U. S. 28, decided for the defendants. On appeal, the Supreme Court of Mississippi receded from its decision in the *Showers* case, held that the case did not come under the operation of the Federal rule, and reversed the decision.

See

*Dickerson vs. Western Union*, 114 Miss. 115,  
74 So. 779.

This ruling was reversed or disapproved by this court in the *Warren Godwin* case, *supra*; but in the meantime the *Dickerson* case had been retried in Mississippi and judgment given against the *Postal Company* for \$500 damages, and this judgment was affirmed by the Supreme Court of Mississippi in

*Postal Telegraph Co. vs. Dickerson*, 79 So. 719.

The Postal Company then petitioned the Supreme

Court of the United States for a *certiorari*, which was granted, see

*Postal Telegraph Co. vs. Dickerson*, 248 U. S. 555,

and the cause on hearing was *reversed*:

*Postal Telegraph Co. vs. Dickerson*, 254 U. S. 609, ..

the memorandum decision reciting:

"Per curiam: Reversed upon the authority of *Postal Teleg. & Cable Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27, and *Western Union vs. Boegli*, 251 U. S. 315."

It will be observed it was here held, upon the authority of the *Warren Godwin* case, involving an *error* in transmission, that the same rule applies where there was a *total failure of transmission*, from which it follows that the Federal rule is controlling in respect to all interstate messages.

In the *Dickerson* case the complaint also charged *gross negligence* and wilful misconduct in its *total failure to transmit the message*. In referring to that case, this Court in *Postal Telegraph Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27, speaking through Chief Justice White, said:

"For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court in the *Dickerson* case as to the correctness

of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris vs. Western Union Tel. Co.*, 174 N. C. 92, which is among the cases expressly approved in the *Warren Godwin* case, and on which the court in part bases its opinion, was a case of *failure to deliver*. The Supreme Court in the *Warren Godwin* case did not undertake to specify all the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field*, and extended the power of Congress over the rates of telegraph companies for *all interstate business* and contracts made by them as to such subject, and has vested the power to determine the reasonableness of the rates, rules, contracts and practices of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

In the case of

*Western Union vs. Orr*, 60 Okla. 39, 158 Pac.  
1139,

the action was "for damages for negligently failing to transmit and deliver" a message. The court held that the regulations above referred to were controlling as to the measure of damage.

See, also,

*Hartness vs. W. U. Tel. Co.*, 112 S. C. 11, 99  
S. E. 759;

*W. U. Tel. Co. vs. Lee*, 174 Ky. 210, 192  
S. W. 70;

*W. U. Tel. Co. vs. Hawkins*, 198 Ala. 682, 73  
So. 973.

We urge that the case comes within the scope of the Act of Congress and directly within the terms of the provisions limiting liability in case of *non-delivery* of messages. The Court of Appeals says, near the close of its first opinion (272 Fed., p. 229): "Non-delivery might be caused by the carelessness of a boy employed by a *receiving* (that is, terminal) office to deliver a transmitted message," which is true; *but it may, in the same manner* as in this case, be caused by the inadvertence of a girl employed at the *sending office, both of whom are engaged in interstate commerce*. There is no distinction between the two cases, except as to the extent of performance of what the Circuit Court of Appeals denominated a contract; but this Court has said that the liability is not fixed by contract, but is fixed *as a matter of law*, as in the *Estere Bros. case*, where there was no contract at all.

## THE VALUATION CLAUSE IN THE MESSAGE REGULATIONS

The second regulation, above quoted, provides that the company shall not *in any event* be liable for damages for (1) mistakes, or (2) delays in transmission or delivery, or for (3) *non-delivery, whether caused by the negligence* of its servants or otherwise, *beyond the sum of \$50*, at which amount this telegram is valued, unless a greater amount be stated and the higher rate be paid. Here the non-delivery was caused by the negligence of the company's servants. The Circuit Court of Appeals held that this clause had no application to interstate messages where gross negligence is present. It is held by the Supreme Court, however, that this clause has no relation whatever to negligence of any degree, *whether gross or simple*, but is a *value* agreed upon for rate-making purposes and is controlling, even though gross negligence is found. Obviously, the *value* of a thing cannot be changed by the degree of negligence in dealing with or handling it. The District Court upon the first trial decided there *was no gross negligence* (Tr., p. 158). The Court of Appeals, however, construed the total failure to transmit as gross negligence. The District Court on the *second* trial again found (Finding XIV, Tr. p. 49):

"That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence, unless the failure to transmit a telegram constitutes gross negligence *per se*."

The cases cited by the Court of Appeals in support of its first decision (272 Fed. 223) were decided *before* the Act of Congress was passed, and also *before* there was any valuation clause in the regulations.

Regarding this valuation clause, the Court of Appeals (p. 229) says:

"Granting such a restriction is valid and binding where there has been mistake or delay in the transmission or delivery, or where the message has been transmitted but not delivered, whether such errors have been caused by the negligence of the service of the company, or otherwise, we do not consider non-delivery as the full equivalent of non-transmission."

We respectfully contend, however, it is immaterial whether "non-delivery" is the full equivalent of "non-transmission" or not, because the regulation in respect to the valuation of messages provides that the company *in any event* shall not be liable beyond the \$50 in case of mistakes or delays in transmission or delivery, but also provides that the company shall not in *any event* be liable *beyond \$50* for the *non-delivery*, whether caused by the negligence or otherwise. The rule is as definite and specific as to *non-delivery* as to *non-transmission*.

Since the Act of Congress and the approval by the Interstate Commerce Commission of this valuation

clause of the regulation, its validity has been upheld by the Commission in

*Cultra vs. Western Union*, 44 I. C. C. 670.

There the Commission said:

"The liability of the carrier is limited to the sum of \$50, unless a greater value is declared. If a greater value, an additional charge must be paid. The same limitation of value is observed in the form of express rates prescribed in 'Express Rates and Practices, Accounts and Revenues,' 28 I. C. C. 132-137."

The *Cultra* case was expressly approved by this court in

*Postal Tel. Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27. (See p. 31.)

In that opinion this court also expressly approved the following cases, in which the valuation clause in the regulations here in question was upheld:

*Bailey vs. Western Union*, 97 Kans. 619;

*Western Union Tel. Co. vs. Schade*, 137 Tenn. 114.

This provision of the regulations, therefore, has no relation to the degree of negligence, whether simple or gross, nor to the place where the negligent act

occurred, whether it be at the sending or the receiving office of the company. In

*Frederick vs. Western Union Tel. Co.*, 189  
Iowa 1138, 179 N. W. 934.

there were present the elements of non-delivery and gross negligence. In the opinion, based upon the recent Federal authorities, the court said, page 936:

"Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending such telegram, but not to exceed \$50."

In

*Klotz vs. Western Union Telegraph Co.*, 187  
Iowa 1355, 175 N. W. 825.

the Supreme Court of Iowa upheld this provision, making the following statement in the course of its opinion:

"We are not unmindful of the fact that State courts, dealing with the subject matter now under consideration, have reached different conclusions, but when the Supreme Court of the United States has spoken upon and given a construction to the Acts of Congress the construction given controls the action of the State courts. *When the Supreme Court says that the Act of 1910 was intended to control telegraph companies, and when it says the Act empowered telegraph companies to establish reasonable rates, subject to the control which the*

*Act to regulate commerce exerted, and when it says that the power thus given carries with it the authority to provide a rate and the right to fix a reasonable limitation of responsibility, bottomed on the rate, it follows that when the company proceeds upon that theory, fixes its rates and fixes the liability for negligence, bottomed on the rate, the liability fixed in the contract is the only liability to which the company can be subjected."*

In *Jacobs vs. Western Union Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31, the validity of the valuation clause above quoted was involved. Basing its opinion largely upon the railroad and express cases herein cited, the court said:

"But the provision as above set out, limiting the liability to \$50 for mistakes or delay in transmission, or delivery finds application to the case and must control our disposition of it; for that was the value indorsed on the back of the message and became a part of the contract."

And also:

"And the fact that this action is brought by the sendee of the message does not prevent the defendant company from claiming the benefit of the limitation of recovery. It is true the action is not between the immediate parties to the contract, but the contract created a duty of prompt delivery by the company, for a violation of which the sendee may maintain an action sounding in tort. He gets his action through the instrumentality of the con-

tract, and out of which his right must arise. He must, therefore, accept the provisions of the contract, which limit the undertaking of the company."

*Gardner vs. Western Union Tel. Co.*, 231 Fed. 405.

In *Western Union vs. Kaufman*, 62 Okla. 160, 162 Pac. 708, the defendant in a suit for damages upon an interstate message specially pleaded, first, the un-repeated message clause; second, the agreed valuation clause; third, the sixty-day clause, providing for written notice of the claim. The lower court sustained demurrers to these special defenses, and the judgment was reversed on appeal, the court saying (see last paragraph):

"The special defenses which they pleaded and relied upon here were good and that the trial court committed an error in sustaining a demurrer thereto."

In *Bailey vs. Western Union Tel. Co.*, 97 Kans. 619, 156 Pac. 716, the validity of the valuation clause pleaded in this case was involved. The court said:

"Prior to the passage of the Act of Congress in June, 1910, whatever may have been the law governing the right to recover damages on account of the delay in the delivery of telegraph messages, since the passage of that Act the decisions appear almost unanimous that the limitations on the liability of telegraph companies for damages caused

by delay in delivering the messages are governed by the regulation above set out, and that no other recovery can be had" (citing numerous cases).

In *Hartness vs. Western Union Tel. Co.*, 112 S. C. 11, 99 S. E. 759, the suit was upon an interstate message, and a verdict rendered against the telegraph company. On appeal the court reduced the judgment to \$50, the amount of the agreed valuation of the message, basing its decision upon the ruling of the Interstate Commerce Commission in the case of *Cultra vs. Western Union*, 44 I. C. C. Rep. 670, quoting at some length from the report of the Commission.

#### THE RULE AS TO VALUATION IN THE RAILROAD AND EXPRESS CASES

In the *Cultra* case, *supra*, approved by this Court, the Interstate Commerce Commission, basing its opinion largely upon "The Express Cases," construing similar contracts, said:

"The sender of a telegram occupies much the same position as a consignor of an express package."

This court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

*Adams Express Co. vs. Croninger*, 226 U. S. 491;

*Kansas City vs. Carl*, 227 U. S. 639;

*Missouri Ry. vs. Harriman*, 227 U. S. 657;  
*Wells Fargo vs. Neiman-Marcus Co.*, 227 U. S.  
 469.

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates, without regard to the place where the negligent act occurred. This court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co. vs. Croninger*, *supra*, is the first and leading case on the subject, and will be found cited and approved at almost every term of court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The court does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was \$50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the

degree of negligence or whether the package was lost at the *originating point or the point of destination*.

We respectfully call the court's attention to the following paragraphs of the opinion in *Adams Express Co. vs. Croninger*, which we contend are controlling:

"It has, therefore, become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

\* \* \* \* \*

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. **The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater.** *The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles*

*of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."* (Italics ours.)

In *Wells Fargo vs. Neiman-Marcus Co.*, 227 U. S. 469, the action was to recover from the express company the loss of a package of furs "shipped from New York to Dallas, Texas, and never delivered." The agreement as to value in case of loss was substantially the same as in this case. The court determines that in the case of loss the shipper is held to that declared value. The court said:

"The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In *Dorton Bros. vs. Southern Pacific Co.*, 151 Cal. 763, plaintiffs delivered to the railroad company for shipment two horses, which were valued for rate-making purposes at \$20 each. The horses were injured or killed in transit through the *gross* negligence of the defendant. Plaintiff sued for \$2700, their actual value. The court held that the plaintiffs were limited to the value stated, and that the contract was

not a contract limiting liability, but was a contract dealing primarily with value as a basis upon which freight rates were paid.

We can perceive no difference in respect to this value whether the horses, after they were delivered to the railroad company for shipment, were killed through the negligence of its servants at the shipping point, or at the terminal or any intermediate point.

Respondent contends that the Federal rules as to limitation of liability have no application where there is gross negligence, basing his contention on the fact that in the case of *Postal Tel. Co. vs. Bowman-Bull Co.*, 290 Ill. 155, where there was said to be gross negligence, this court denied certiorari (251 U. S. 562). No opinion was filed, and therefore it does not appear what was the basis of the order. Refusal of certiorari does not always mean approval of the result below. If the degree of negligence was of importance when the relations between a telegraph company and its patrons were relations purely of contract, it is difficult to understand how that question can have any significance now, when the limitations of liability, as Justice Brandeis so pithily remarked in the *Estere* case, do not grow out of agreement and cannot be varied by lack of agreement, but are an inherent part of the rate structure itself. *In any event in the Bowman and Bull case there was no valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission.*

*Therefore, the question as to the validity of such a regulation did not arise.*

The most recent decision of this court construing the valuation clause of express company contracts is the case of

*American Railway Express Co. vs. Levee,*

decided October 22, 1923, 1 Adv. Opinions, page 4.

In that case, as here, there was an agreed valuation of *not exceeding* \$50. The defendant relied upon this limitation of liability, which the State court denied. This court held the limitation to be valid, saying:

"Under the law of the United States governing interstate commerce, the stipulation constituted a defense to liability beyond \$50, unless plaintiff should prove some facts that took the case out of the protection of the contract."

In the present case, if at the time the receiving clerk, Margaret Brown, whose inadvertence caused the non-delivery, was handling this message at the Boise office, she had also had in her possession a message which had been received over the wire and was ready for delivery at that point, and through the same act of inadvertence, both messages had by her been misplaced and neither of them delivered, the court cannot consistently, with the comprehensive scope of the Act of Congress, hold the company liable, or the valuation clause inapplicable, in the one case and not in the other. *The Act of Congress makes no such*

*distinction. Its application is not restricted to but a part only of interstate messages. It was not the intention of Congress that the common-law measure of liability should apply to a part of the service and the Act of Congress to the other. Certainly, Congress had power to include this case in the uniform national rule. The question is, did it do so? We think the answer has been given by this court. In view of its decisions that Congress, by the Act, intended to regulate the entire field of interstate telegraphy, we think a decision that it has but a limited scope in respect to such messages is error.*

#### GROSS NEGLIGENCE

The District Court, in its opinion given upon its first trial of this case, decided there was no gross negligence in the handling of the message. (See Tr., p. 158.)

On the second trial that court again found that the non-transmission of the telegram was due to *inadvertence* and was not due to any wilful, malicious or wanton act, and

"That the clerk, Margaret Brown, was capable and an efficient employe, and the non-transmission of the telegram was due to her *inadvertence* and was *not* due to any wilful, malicious or wanton act on her part."

"That the failure to transmit and deliver the said telegram under the circumstances as hereinbefore

found *did not constitute gross negligence* unless the failure to transmit a telegram constitutes gross negligence *per se*" (Findings XIII and XIV, Tr. p. 49).

But even if such failure be gross negligence *per se*, nevertheless the *valuation clause* of the message regulations, as pointed out above, is not a limitation of liability but is an *agreed valuation*, and applies in cases of gross negligence equally with that of any other degree.

*The Circuit Court of Appeals did not take the position that the valuation clause involved here is ineffective in all cases against gross negligence; but, on the contrary, said "granting such restriction is valid—that is, valid even where there is gross negligence in respect to non-transmission—yet, says the court, "We do not construe non-delivery, as the full equivalent of non-transmission" (272 Fed. 229, Tr. p. 171), which brings us back to the question discussed above as to whether Congress by the Act of 1910 intended to fix a uniform rule of liability for interstate messages which fail for certain reasons and not for those which fail for other reasons. Such construction is inconsistent with the expressed purpose of Congress to subject all interstate messages to uniform Federal rule. It was not intended by the Act that inquiry should be made as to the cause or place of failure, in order to ascertain whether the case is controlled by the national rule.*

It was said by this court in the *Warren Godwin* case that the dominant purpose of the Act of 1910 was to subject such companies as to their interstate business to the rule of equality and uniformity. The Act expressly provides against all discrimination. It also provides for the classification of messages with different rates and different liabilities. *The plaintiff in this case, though paying the lowest rate provided in the regulations, secured the same judgment as if he had paid the highest rate and the message had been valued at \$1,500 instead of \$50. If, therefore, it be held that the company is under the same measure of liability to one who pays the lowest rate under the lowest valuation as it is to one who pays the highest rate and under a higher valuation, then the fundamental purpose of the Act is defeated. In view of this fact, the following language of this court in the Warren Godwin case seems especially applicable. The court says (see bottom of p. 30):*

"In the third place as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be classified . . . and different rates may be charged for different classes of messages, it would seem unmistakably to draw under Federal control the very power which the construction given below to the Act necessarily excluded from such control."

## AS TO THE SIXTY-DAY CLAUSE FOR PRESENTING CLAIMS

The sixth regulation on the message blank provides:

"6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission."

The message was filed for transmission on November 30, 1917. No claim was presented in writing for damages herein until June 18, 1918. (See last paragraph of letter of plaintiff, Tr., p. 84.) The plaintiff, Czizek, replies that he did not know of the fact that the message had been sent until he returned to Boise in *February*, when the failure of the message was called to the company's attention, at which time the agent promised to investigate the matter and ascertain the cause of the failure, but without waiving the defense as to the presentation of the claim, and no claim was presented until *four* months later. As to this question, the court found as follows:

"That there was no written or formal demand for damages by plaintiff until June 18, 1918, at which time he wrote the letter introduced in evidence as Plaintiff's Exhibit No. 4, claiming damages in the sum of Forty-five Hundred Dollars (\$4500), and in response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the pe-

riod specified on the telegraph blank" (Finding XVII, Tr., p. 50).

The court's Conclusion of Law was:

"1. That the acts of defendant and its employes do not constitute a waiver of the provision requiring claim for damages to be made in writing within sixty days of the time the message was filed with defendant."

The validity of this sixty-day clause of the regulations was involved in the case of

*Gardner vs. Western Union Tel. Co.*, 231 Fed. 405,

where it was held to be binding upon the receiver of the message. This decision was approved by this court in the *Warren Godwin* case. This requirement that *all* claims must be presented in writing within sixty days is not limited to messages which have been put in the course of transmission. There is no such exception in the statute or in the regulations. The requirement is not dependent upon whether the negligence is gross or simple, or whether the message failed at the point of origin or of delivery. There is as much reason for the presentation of a claim in one case as in another. The regulation provides that the claim must be presented in writing "*in any case*," else "the company will not be liable for damages." This regulation is not a limitation for liability for negligence, but a rec-

ognition of such liability. It is stated, 37 Cyc., p. 1689, that the provision is "a recognition of such liability coupled with a reasonable requirement that the company shall have an opportunity to investigate the facts while its records are still in existence and the facts fresh in the memory of witnesses." (See *Southern Express Co. vs. Caldwell*, 21 Wallace, 264.)

THE CARRIER HAS NO AUTHORITY TO WAIVE THE PRO-  
VISION FOR PRESENTING CLAIMS

The company has no right to waive such provision.

*Western Union vs. Esteve Bros.*, 256 U. S. 556;  
*Chicago & Alton R. R. Co. vs. Kirby*, 225  
U. S. 155.

In *Georgia, Florida, etc. Co. vs. Blish Milling Com-  
pany*, 241 U. S. 190, 60 L. Ed. 948, this court consid-  
ered the question of waiver in the following language:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In *St. Louis etc. Co. vs. Starbird*, 243 U. S. 592, 61 L. Ed. 917, the court holds that notice to the dock master was not a compliance with a requirement of the bill of lading that claims of damage be reported to the delivering line within thirty-six hours. The court points out that the case arose before the Act of March 4, 1915; hence it is clearly an authority here.

In *Southern Pacific Ry. Co. vs. Stewart*, 248 U. S. 446, 63 L. Ed. 350, the cause of action also arose before 1915, and the court held that it was error to submit the question of waiver to the jury and that the court below should have granted the carrier's request for a directed verdict. In that case also it appeared that the local agent of the company knew of the loss immediately. In *Gooch vs. Oregon Short Line R. Co.*, 264 Fed. 664, this Court quotes the following from the *Blesh Milling* case at page 666:

"Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations."

At page 667 the court said:

"It is true that in the present case the carrier had actual notice of the injury complained of, and through its agents sought, without success, a settlement of the damages occasioned thereby; but the offer of settlement was refused, and at no time, so far as appears, was the amount of his claim stated, even verbally, by the plaintiff in error or by any representative of his."

We think the cases above cited are clearly applicable here, and that in order to prevent discrimination and uphold the rule of uniformity prescribed by the Commerce Act, the rule applied to carriers of goods must be applied to telegraph and cable companies.

PLAINTIFF HERE DID NOT PRESENT THE CLAIM UNTIL MORE THAN SIXTY DAYS AFTER DISCOVERING THAT THE MESSAGE HAD BEEN SENT.

Plaintiff says he did not know of the message until February; but even then he presented no claim in writing until more than sixty days thereafter, and the court found the requirement was not waived.

In

*Postal Tel. Co. vs. Nichols*, 159 Fed. 43.

the claim was not presented in writing within sixty days from the time the message was filed. It was presented, however, within sixty days from the time

that plaintiff received knowledge of its non-delivery. The court said:

"There was testimony on the part of the defendants in error to the effect that they did not know of the non-delivery of the telegram to Captain Richardson prior to July 11, 1903, which was much within the sixty-day period."

The same conclusion was reached in

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210.

A fair conclusion from these decisions is that if the claim had not been presented within sixty days from the discovery, the provisions of the contract would have constituted a defense to the action. The District Court in the present case adopted this view, basing its opinion upon the two cases last cited. (See Tr., bottom of p. 156.)

In the court below, respondent cited the case of

*Larsen vs. Postal Tel. Co.*, 150 Ia. 748.

That opinion was based upon a special provision of a statute of Iowa which would be invalid since the amendment of 1910 to the Interstate Commerce Act.

PLAINTIFF'S TESTIMONY UPON WHICH THE JUDGMENT WAS BASED AS TO WHAT HE WOULD HAVE DONE WITH RESPECT TO THE SALE OF HIS STOCK HAD THE MESSAGE BEEN RECEIVED WAS INADMISSIBLE.

Plaintiff testified, over objection, that if he had received the telegram *he would have sold the stock*. The judgment was based upon this testimony. The District Court at the first trial held that such evidence was inadmissible, saying:

"The inherent difficulty held to be insuperable in many cases is the importance of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened."

And further:

"Applying the principle, in many and so far as I am advised in most, of the decided cases, I feel impelled to sustain the defense." (Citing cases, see Tr., pp. 159-60.)

On the second trial the court found (see Finding XV, Tr., p. 50):

"In deference to what is understood to be the view of the Circuit Court of Appeals, it is found that if plaintiff had received the telegram promptly he would have accepted the offer and could have delivered the stock in time to avail himself of such offer" (Finding XV, Tr., p. 50).

The telegram did not, however, contain any offer to buy plaintiff's stock. His attorney stated that he was *inclined* to accept the offer made him. What plaintiff in such case of uncertainty would or would not have done is only *conjecture*. Such evidence is merely the *opinion* of an interested party given after the event was known. After it was ascertained that the bank had gone into liquidation and that a sale at the time would have been advantageous, plaintiff was of the opinion that he would have sold. If it had turned out that the bank did not liquidate, but the stock had *advanced* in value, plaintiff's opinion as to what he would have done might have been different. Such evidence has uniformly been excluded by the courts. It is said in

*Hall vs. Western Union*, 59 Fla. 275, 27 L. R. A. (N. S.) at p. 642:

"The acceptance of the offer depended upon the independent will of the addressee, and this contingency precludes recovery."

The principal cases are:

*Richmond Hosiery Mills vs. Western Union Tel. Co.*, 123 Ga. 216;

*Western U. Tel. Co. vs. Watson*, 94 Ga. 202;

*Beatty Lumber Co. vs. Western U. Tel. Co.*, 52 W. Va. 410;

*Kiley vs. Western U. Tel. Co.*, 39 Hun 158;

*Smith vs. Western Union*, 83 Ky. 104, 4 Am. St. Rep. 126;

*Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371;

*West. Union vs. Hall*, 124 U. S. 444;

*Alexander vs. Western U. Tel. Co.*, 126 Fed. 445.

In the *Richmond Mills* case, *supra*, there was an offer to sell cotton yarn "delivery commencing in October." By an error in transmission the telegram read "delivery commencing in December." Testimony was offered to the effect that if the message had been transmitted correctly the offer would have been accepted, and the court, after quoting from the cases on the subject, said:

"So, in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice-president, thinks now that it would have accepted the offer; but it is exceedingly speculative, as the basis for damages, to say that, if an offer had been received, the plaintiff would have accepted it and would have derived certain advantages from it.

In the *Beatty Lumber* case, *supra*, the telegram quoted a price on a certain quantity of lumber. The telegram was not delivered and the question arose as

to the admissibility of the evidence to show that the proposals would have been accepted. The court says:

"To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated, as a witness, that his firm would have accepted that proposal if it had been received. *This will not prove the fact.* That evidence does not make the fact certain. The opinion of this witness months afterward cannot go to that length. In *McCall vs. W. U. Tel. Co.*, cited, the party to whom the telegram was addressed said that he would have accepted its proposal, but the court said this did not change the nature of the matter. So, in *Smith vs. W. U. Tel. Co.*, cited, the jury found that if the telegram had been received, the party would have sold his stock, but the court said: 'What a person might or would have done in a certain event is not the proper subject of a special finding, and will not be considered.'"

In the *Watson* case, *supra*, the suit was based upon a claim that had the message been properly transmitted, plaintiff would have sold certain cotton gins to Pitner, and Pitner testified that he would have accepted the offer. The court says:

"In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true, Pitner says now that he would have made it, but we cannot tell whether he would have done so or not. He might

have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery."

In the *Kiley* case, the message was an offer to buy of Hilton & Waugh a quantity of oil. Hilton & Waugh were at liberty to reject the offer had the message been received. The court said:

"But how can it be said with any degree of certainty that Hilton & Waugh would have accepted the plaintiff's offer to purchase of them the quantity of oil mentioned? They were under no legal obligation to accept his proposition. The claim of the plaintiff that they would have done so is wholly speculative."

In *Western U. Tel. Co. vs. Ferguson*, 157 Ind. 64, 54 L. R. A. 846 and on 849, the court states:

**"The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff's present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture.** Thus the mental anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency."

As above stated, in *Hall vs. Western U. Tel. Co.*, 59 Fla. 275, 51 So. 819, 27 L. R. A. (N. S.) 639 and on 642, it is said:

"The acceptance of the offer depended upon the independent will of the addressee, and this contingency precludes recovery."

In *Smith vs. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, plaintiff employed a stock broker to buy stocks to sell upon plaintiff's order. The broker sent a telegram on November 18, notifying plaintiff of the purchase of certain shares of stock, but the message was not delivered. The stocks declined in value and became worthless. Plaintiff, who sued the telegraph company for damages for failure to deliver the dispatch, testified at the trial that, if the message had been delivered notifying him of the purchase, he would have ordered the stock sold and averted the loss. Among other special issues submitted to the jury were the following: (See 4 Am. St. Rep., p. 129.)

"9. If the jury shall find that the telegram of the 18th of November, 1879, was not received by Smith, then they will say whether, if it had been received by him, he would have ordered his stock, or any part of it, to be sold, either on the nineteenth or twentieth days of November, 1879.

Answer. He would."

The court held that this testimony was inadmissible, stating as follows (p. 133) :

*"If the dispatch had been received, then he might or might not have taken it and acted. It rested altogether with him, and is unlike the case of an agent who is ordered by a telegram to do a certain act, but which by reason of its non-delivery he does not do, thereby entailing a loss upon his principal."*

And further (p. 134) :

*"It is urged, however, that the jury, by the answer to the ninth interrogatory, found that if the appellant had received the telegram, that he would have ordered his stock sold; and that, as this finding was not objected to, it is, therefore, conclusively shown that the loss would not have occurred if the message had been delivered. In our opinion, **what the appellant might or would have done could not be the subject of a special finding.** It was not a matter of fact, and the appellee was not, therefore, bound to object to it; and it does not follow, therefore, that it is conclusively shown that the loss was the direct result of the appellee's failure to deliver the message."*

In *Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371, the Court ruled on the admissibility of similar evidence. The question put to the witness was as follows (p. 380) :

"Q. This 1,208,000 feet of Grand Haven pine,

which you testified was in the possession of A. M. Dodge and Company in its yards at Tonawanda, on or about November 6, 1890, **would you have sold** that amount of pine to the plaintiff in this action at the prices mentioned in the contract in suit?"

This was held inadmissible.

In respect to such evidence, the court said:

"There are several objections to this question, but a statement of two of them will suffice to show that the referee did not err in his ruling. In the first place **the question did not call for a fact, but instead for a mere operation of the witness' mind, the secret undisclosed intent of the witness** in the event of the presentation of a situation calling for action. It did not inquire of Crane whether he had tendered that quantity of pine lumber to the plaintiff at the same rate as the contract called for, or that he offered it to him, but sought merely to elicit from him his secret mental operation, which was safely beyond contradiction. *Such evidence is not admissible.*"

In this court it is held, in effect at least, in

*Western Union Tel. Co. vs. Hall*, 124 U. S.

444,

that such evidence was inadmissible. In that case the plaintiff, Hall, sued the telegraph company for damages, claiming that by the delay in the delivery of the telegram he lost the opportunity to sell certain shares

of oil stock and that, if he had received the message, he would have sold the stock. The court said:

"Whether or not the plaintiff would or would not have sold it is altogether uncertain."

In *Alexander vs. Western Union Tel. Co.*, 126 Fed. 445, the plaintiff sued for damages, alleging that by reason of the delay in the delivery of a telegram he was unable to attend the funeral of his father. Plaintiff claimed that, had the message been delivered, he would have attended the funeral. The court, in sustaining the demurrer, said:

"What the plaintiff might or might not have done under a different set of circumstances is rather too uncertain and problematical to form the basis of a lawsuit."

Petitioner therefore earnestly contends that the damages claimed are not such as would follow as a legal certainty as the proximate result of the defendant's act.

The rule on this subject, as suggested by one of petitioner's present counsel in his article in Cyc., entitled "Telegraphs and Telephones," 37 Cyc. 1760, and which counsel for petitioner still believe is a sound statement of the law, is as follows:

"Where the message relates to a proposed contract between plaintiff and another person, but is neither an acceptance of a previous offer nor itself

a definite offer, but only an invitation to submit an offer or to meet or correspond with the sender for the purpose of further negotiation, the failure duly to deliver the message is not, as a matter of law, the proximate cause of the failure of the negotiations to result in a binding contract, and damages for the loss of a contract which might or might not have resulted from further negotiations being too remote and uncertain, only nominal damages can be recovered."

The above rule of law taken from Cyc. has been quoted with approval in the following cases:

*White vs. Western Union Tel. Co.*, 153 N. Y. App. Div. 684;

*Security Mortgage Co. vs. Western Union*, 141 Ark. 79, 216 S. W. 10;

*Western Union vs. Caumissar*, 160 Ky. 569.

In *White vs. Western Union*, p. 686, the court said:

"The complaint, as it seems to me, is defective, because it does not show that any damages were sustained by reason of the defendant's failure to forward and deliver the cablegram. There is no allegation in the complaint to the effect that Behn had offered to sell the onions at the price stated in the message delivered to defendant. Nor was the message an acceptance of any offer. The message, so far as appears, was an inquiry as to whether the 'onions offered are crates 20 kilos net.' What the answer would have been it is useless to conjecture. In this respect the allegations of the complaint fall within the rule stated in 37 Cyc. 1760."

It will be observed that the telegram to respondent in the case now on argument was neither an offer, nor an acceptance of an offer, but, like the message in the above case, was but an inquiry as to whether respondent would sell.

In the *Caumissar* case the court said, respecting such a message:

"Whether he could have made the plaintiffs an offer, and what offer he would have made and what disposition they would have made of the offer rests wholly in the domain of uncertainty."

THE CIRCUIT COURT OF APPEALS, IN ITS LAST DECISION,  
WAS NOT BOUND BY ITS RULING ON THE FORMER  
APPEAL.

The Court of Appeals held that its decision on the former appeal had become the law of the case and was controlling of this appeal, citing some early cases, and among others the case of

*Messenger vs. Anderson*, 171 Fed. 785.

But this case was carried here and decided in

*Messenger vs. Anderson*, 225 U. S. 436.

It is there said by this court, speaking through Mr. Justice Holmes: "It was held by the Circuit Court of Appeals after the affirmance by the Supreme Court

that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment." In reversing this ruling, this court said:

"In the absence of statute the phrase, the law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

The court held that the Court of Appeals should have reversed the judgment and construed the will as did the State court, if for no other reason, because that construction "was right."

The last expression of this court on the rule invoked is found in

*Chase vs. United States*, 256 U. S. 1,

where the court said (p. 10):

"The proposition has a relevant and conclusive application when a judgment of a former action is pleaded, but limited application when urged in the same suit; it expresses a practice only, and useful as such, but not a limitation of power. *Messenger vs. Anderson*, 225 U. S. 436."

See, also,

*Moss vs. Ramey*, 239 U. S. 539;

*Johnson vs. Cadillac Motor Car Co.*, 261 Fed.  
878.

Petitioner contends that the judgment should be reversed.

Respectfully submitted,

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